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IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

No. 319.

THE UNITED STATES, *Petitioner*,

vs.

ACME OPERATING CORPORATION and LIBERTY TRUST COMPANY, *Intervenor*.

RESPONDENT'S BRIEF.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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RESPONDENT'S BRIEF.

STATEMENT.

This is an application by the Government for a writ of certiorari to review the judgment of the Court of Claims in the case of Acme Operating Corporation v. United States, No. E-260.

This case arises out of the taking by the United States, acting through the United States Shipping Board Emergency Fleet Corporation, and under Act of June 15, 1917, of two ships known as the H. M. Whitney and the James S. Whitney on which the Intervenor's predecessor held mortgages. The mortgages being Massachusetts mortgages, the

legal title to these ships was in the Intervenor's predecessor as mortgagee (Record p. 62) although subject to certain liens for money owed to certain shipyards. The equity of redemption was in the Acme Corporation or corporations affiliated with it.

The ships when taken were "in all respects staunch, strong, seaworthy and in good repair." (Finding 32, Record p. 49.) They were subsequently released from requisition in such unseaworthy condition that it required the expenditure of $129,299.76 and two or three months' time to put them back in the condition in which they had been at the time of the requisition. (Finding 24, Record pp. 43, 44.)

It was conceded by the Government before the Court of Claims that the just compensation to be paid for the requisition included compensation for the damage to the condition of the vessels. (Record p. 64.) The only questions on this phase of the case were the amount of damage and whether such amount was owed to the mortgagee or to the holder of the equity against which the Government had a set-off. The Court gave judgment for the mortgagee and the Government brought the present petition.

I.

No Question of General Importance Sufficient to Invoke the Discretionary Power of this Court to Grant a Writ of Certiorari is Presented by Petition.

It is submitted that the question of whether in a given case compensation for a taking should, on the facts of the case, be paid to the mortgagee or to the holder of the equity of redemption does not present such "special and important reasons" for the exercise of the Court's discretion as to bring the case within any one of the classes indicated in revised rule 38 of this Court.

Counsel for the petitioner, as a reason for granting the writ, says: "In its determination of the 'new principle for which it found no direct precedents in the authorities' the

Court so far departed from the usual and accepted course of judicial procedure as to require the exercise by this Court of its supervisory powers of review." (Record p. 5.) An examination of the opinion of the Court of Claims will show that it had for consideration two claims of the Intervenor. The main contention of the Intervenor was that it had been prevented from foreclosing its mortgages by the requisition, that the value of tonnage had so diminished that the value of these vessels was less than the shipyard's liens which were prior to the lien of the mortgages and that therefore the Intervenor was entitled to recover an amount equal to the mortgage debt. The second claim related to the damaged condition of the vessels when released from requisition. The language of the Court of Claims quoted in the petition relates to the first claim, which the Court denied, and not to the second claim, which they allowed. The Intervenor's claim for the depreciation in value of the ships on account of a lower market price of tonnage at the time of the release from requisition is discussed on pages 62 to 64. The matter of the damaged condition of the vessels is discussed separately, beginning at the bottom of page 64 of the record. It is submitted that even if the principle involved in the first claim was a new one, it having been decided adversely to the Intervenor the petitioner has no ground of complaint. The second claim, namely, for the cost of repairing and reconditioning the vessels, was, of course, in no sense novel but on the contrary has been established by a long line of decisions. *Delano v. Smith,* 206 Mass. 365, *Morgan v. Gilbert,* 2 Fed. 835. See also Jones on Mortgages 8th Edition, sections 843, 851, 858 and 859 and cases therein cited.

II.

The Claim Being for Compensation Payable Under the Terms of the Act of Congress, There Can Be No Question of the Jurisdiction of the Court of Claims.

Public Act No. 23, of the 65th Congress, House Resolution 3971, entitled "An act making appropriations to supply urgent deficiencies in appropriations for the Military and Naval Establishments on account of war expenses for the fiscal year ending June thirtieth, nineteen hundred and seventeen, and for other purposes," approved June 15th, 1917 (U. S. Statutes at Large, Vol. 40, Part 1, Ch. 29, Page 182), provides that:

> "The President is hereby authorized and empowered, within the limits of the amounts herein authorized: (e) To purchase, requisition, or take over the title to, or the possession of, for use or operation by the United States, any ship now constructed or in the process of construction or hereafter constructed, or any part thereof, or charter of such ship."

The act further provides (Page 183):

> "Whenever the United States shall cancel, modify, suspend or requisition any contract, make use of, assume, occupy, requisition, acquire or take over any plant or part thereof, or any ship, charter, or material in accordance with the provisions hereof, it shall make just compensation therefor, to be determined by the President; and if the amount thereof so determined by the President, is unsatisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum, will make up such amount as will be just compensation therefor, in the manner provided for by section 24, paragraph twenty, and section one hundred and forty-five of the Judicial Code."

The act also provides (Page 183):

> "The word 'person' shall include any individual, trustee, firm, association, company, corporation or contractor."

> "The word 'ship' shall include any boat, vessel or submarine and the parts thereof."

It is the contention of counsel for the Government in the instant case that a mortgagee of requisitioned ships, who was not entitled to immediate possession of the ships at the time of the taking, is not included within the class of persons entitled to compensation under the statute and therefore his claim is a tort claim and accordingly outside the jurisdiction of the Court.

The claim of the mortgagee is not for interference with its possession of the mortgaged property, but for actual physical injury to property to which it held the legal title.

It is submitted that the situation in the present case is analogous to that in the case of *A. W. Duckett & Company, Inc. v. The United States,* 266 U. S. 149. In that case, the President under the Act of August 29, 1916, had taken possession of a portion of the Bush terminal docks and warehouse property in Brooklyn. The claimant was a lessee of a portion of the premises taken. This Court, speaking by Mr. Justice Holmes, at pages 151, 152, said:

> "We see no ground for attributing to The United States the extraordinary intent to recognize and pay for other interests but to exclude the claimant. The order made no such distinction, but promised fair compensation, seemingly to all, and the subsequent appointments of a board of appraisers contemplated payment to tenants. * * * Whatever the effect of the taking there was a contract implied in fact by the President's order, and there is no doubt concerning the jurisdiction of the Court of Claims."

Since the question here was also a question of whether the United States owed to the Intervenor compensation for the taking of the requisitioned vessels, there can be no doubt on the jurisdictional point.

III.

The Petitioner Has Failed to Show that the Decision is in Conflict With the Weight of Authority.

(a) The first ground on which the petitioner alleges that the decision is in conflict with the weight of authority is that a mortgagee not entitled to possession can not maintain an action against a third person for injury unless the injury was *wrongful*. It is submitted that this contention is unsound for the same reason as the petitioner's argument on the jurisdictional point. Since the award was for compensation under an implied contract, it follows that there was no occasion to show that the damage was wrongfully inflicted. In such a case it is no more necessary to show wrongful action than in any case of eminent domain. The Government assumed to itself by paramount authority and power the possession and control of the vessels, agreeing to pay injured parties just compensation. The injury to the Intervenor was wholly independent of the question of what caused the damage to the vessels. Its claim is based on the fact that its property rights therein were damaged, because the vessels were seaworthy when taken and unseaworthy when returned.

Ordinarily, damages for a taking by eminent domain are regulated by detailed statutes which uniformly recognize and protect the interest of a mortgagee. See, for example, Massachusetts General Laws, c. 79, sec. 33 and 34. Nor do the cases and the text book cited by the petitioner support the proposition for which they are adduced. The cases involved wrongfully inflicted injury and the Courts permitted recovery, but it does not follow from that that a wrong is in all cases essential to the mortgagee's claim. The reference

to Jones on Mortgages is to sections relating to trespasses of one sort or another. The rule as to takings is discussed in a different section of the work. (Section 843.) See also, *Chicago v. Tebbetts,* 104 U. S. 120.

So far as the Government's contention under this section of its argument is based on the fact that it had reached some settlement with the owners for the damage to the vessels, the point would seem disposed of by the language of Mr. Justice Holmes in *A. W. Duckett & Co. Inc. v. U. S.,* 266 U. S. 149, *supra,* where he says (page 151):

> "Any arrangement that the Government may have made with the owner to pay to it what might be due to the tenants did not affect the claimant's rights."

This settlement with the owners is, of course, in the nature of an admission by the Government of liability for repairs, and it is submitted that the remaining question of the exact amount of such repairs and the causes necessitating them on the evidence presents no proper question for certiorari. Furthermore, no claim that the Government was not chargeable with such repairs as were necessary was raised in the Court below as appears from the opinion (Record p. 64), where the Court says:

> "We think it clear that the defendant was liable to some one for any damage done to the vessels themselves. We do not understand counsel for defendant to dispute this general statement."

It is submitted that the claim now comes too late. *Wisconsin Central R. R. v. U. S.,* 164 U. S. 190, *Huse v. U. S.,* 222 U. S. 496.

(b) The second ground on which the petitioner alleges that the decision is in conflict with the weight of authority is that the mortgagee's security was not impaired and that the absence of this feature is fatal to the allowance of compensation.

We submit that the record does not support the contention of the petitioner. The petitioner argues that because the vessels would have been worth $918,000 if in good condition, they were worth that amount less the cost of repairs, or $38,000 more than the face of mortgages and liens having priority thereto. (Record p. 7.) The omission of over $38,000 interest which had accrued on the mortgages and shipyard liens during the period of the requisition, is not explained. But, apart from this it by no means follows that the vessels while out of repair could have been sold at any price or that they could have been sold at the same price three months later when the repairs were completed.

It is therefore submitted that the issue attempted to be raised by the petitioner's third assignment of error is not really in the case. But even if it were, the petitioner does not show that the decision is against the weight of authority. The cases referred to in the petition, while not directly on the point for which they are cited, at least contain *dicta* which bear on it and are *contra* to the contentions of the petitioner. The statement of the law in the text-book cited is in accord with the decision of the Court of Claims. The mortgages were Massachusetts mortgages, executed and delivered in the Commonwealth (Findings 2, 6; Record pp. 30, 31, 62), and title was in the mortgagee. The mortgagee was entitled to recover for injury to the property, although the security remained ample for its protection. It had a right to its security undiminished. *Delano vs. Smith,* 206 Mass. 365.

It is submitted that the Court of Claims did not, as asserted by the petitioner, expressly hold that the Massachusetts rule was not applicable to this phase of the case. What that Court held was that the rule did not control as to the claim for depreciation in value of tonnage during the time the ships were held by the Government. The petitioner states that the Massachusetts rule is based on the fact that

in Massachusetts a mortgagee has a present right to possession. This is, of course, a misconception of the rule. As was said by the Supreme Judicial Court of Massachusetts in the case of *Delano v. Smith*, 206 Mass. 365 (*supra*), at page 369:

> "Whether the mortgagee is in possession of the mortgaged premises, or not, or whether his right to possession begins only with the breach of condition, and there has been no breach, nevertheless he has such an interest in the property and its preservation as enables him to maintain an action in his own name for injury to it. Such right of acton is founded not upon the right to present possession, but upon title to the estate."

The decision of the Court of Claims was not that under the Massachusetts rule the mortgagee was not entitled to recover for damages to the mortgaged property, but was that one who is not entitled to possession at any time during the holding of the mortgaged property by a third person can not recover for diminution in market prices during that period except so far as it is due to actual damage to the property.

It is submitted that the petitioner has failed to show that the decision is in conflict with the weight of authority on either of the grounds assigned in the second and third assignments of error.

IV.

The Complaint as to the Form of Pleading Comes Too Late.

With regard to the claim of surprise alleged in the last paragraph of the petition, we beg leave to call the attention of the Court to what the Court below said on this matter (Record p. 65):

> " * * * it should be observed in this connection that this matter is specifically argued both by the Inter-

> venor and counsel for defendant without any objection being made on account of the indefinite nature of the pleadings or motion for a more specific statement."

It is submitted that this contention falls within the rule laid down in *Wisconsin Central Railroad v. The United States,* 164 U. S. 190, at 212, and repeatedly followed, where the Court said:

> "The record does not disclose that this objection was raised below, while the findings of fact show that the entire matter was before the Court for, and received, adjudication. Moreover, it has been repeatedly held that the forms of pleading in the Court of Claims are not of so strict a character as to require omissions of this kind to be held fatal to the rendition of such judgment as the facts demanded."

See also *Huse v. The United States,* 222 U. S. 496.

V.

The Record Does Not Substantiate the Contention that the Findings Do Not Support the Judgment.

The second contention contained in said last paragraph of the petition is based on the claim that the Court did not find that the expenditures, the amount of which were awarded as compensation, were necessary to restore the vessels to their condition when requisitioned. It is submitted that this is not a fair interpretation of Finding 24, for it is evident that the Court considered that its findings of fact amounted to that in substance, in view of its conclusion of law based on the findings that the Intervenor was entitled to recover the said sum with interest, and in view of the reasoning of the Court in its opinion. The Court of Claims (pp. 65-66) says:

> "There is no direct evidence that the amount which the Intervenor seeks to recover was actually necessary to put the vessels in as good repair and condition as

> they were when the Government took them over, but no question is raised but what the vessels were in good condition when the Government took them * * * we think it would be unreasonable to suppose or believe, when the liens of the construction companies and of the Trust Company so nearly approached the whole value of the vessels, that the Trust Company would expend additional sums on them if it was not reasonably necessary to put them in proper condition * * * The various items which made up these two expenditures all appear to be necessary expenses in reconditioning the ships except $7,165 expended for lifeboats."

From this language it is evident that the issue of fact on which the Court made its finding related to the amount "actually necessary to put the vessels in as good repair and condition as they were in when the Government took them over." On this question of the amount so made actually necessary the Court found that nearly all the items of expenditure were for direct repairs and then expressly indicates certain items which it found that the evidence did not show to be in the nature of repairs or reconditioning and awarded judgment for the amount expended less the specific items not proved. The form of the finding and the fact of the judgment make it clear that Finding 24 was intended by the Court to be a finding that the evidence showed that all the items not excluded were in the nature of repairs or reconditioning actually necessary. It is submitted that this interpretation of the findings is supported by the principle applied by this Court in *U. S. v. Wells*, 283 U. S. 102 at 111.

Respectfully submitted,

HOWE & BRADLEY,
Attorneys for Intervenor.

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ON A WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

BRIEF FOR THE INTERVENOR.

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ON A WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

BRIEF FOR THE INTERVENOR.

OPINION BELOW.

The opinion of the Court of Claims is reported in 74 C. Cls. 82, and its judgment in favor of the intervenor comes before this Court pursuant to an order for certiorari filed October 17, 1932.

STATEMENT OF CLAIM OF LIBERTY TRUST COMPANY, INTERVENOR.

The claim of the intervenor, Liberty Trust Company, is to recover, as the successor of Fidelity Trust Company, with relation to its interests as the holder of mortgages and lien claims on the steamships J. S. Whitney and H. M. Whitney, just compensation, under the provisions of the Act of Congress of June 15, 1917 (U. S. Statutes at Large Vol. 40, Part 1, c. 29, pages 182 and 183) for the requisition of the vessels by the United States of the J. S. Whitney on April 27, 1918 (R. 37 and 38, Finding 18) and of the H. M. Whitney on April 29, 1918 (Rec. 38, Finding 19) and the retention of the vessels under such requisitions until July 10, 1919, as to the J. S. Whitney and July 8, 1919, as to the H. M. Whitney (R. 46, Finding 27).

The provisions of the statute material to the claim are as follows:

> "The President is hereby authorized and empowered, within the limits of the amounts herein authorized: (e) To purchase, requisition, or take over the title to, or the possession of, for use or operation by the United States, any ship now constructed or in the process of construction or hereafter constructed, or any part thereof, or charter of such ship." (p. 182)
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> "Whenever the United States shall cancel, modify, suspend or requisition any contract, make use of, assume, occupy, requisition, acquire or take over any plant or part thereof, or any ship, charter, or material in accordance with the provisions hereof, it shall make just compensation therefor, to be determined by the President; and if the amount thereof so determined by the President, is unsatisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President and shall be entitled to

sue the United States to recover such further sum as, added to said seventy-five per centum, will make up such amount as will be just compensation therefor, in the manner provided for by section 24, paragraph twenty, and section one hundred and forty-five of the Judicial Code."

"The word 'person' shall include any individual, trustee, firm, association, company, corporation or contractor." (p. 183)

"The word 'ship' shall include any boat, vessel or submarine and the parts thereof." (p. 183)

The Liberty Trust Company's claim came before the Court of Claims as follows:

On April 29, 1925, the Acme Operating Corporation filed a petition in the Court of Claims against the United States, by which it claimed that it was, by virtue of its interest in the vessels as a charterer thereof under charters executed before the requisitions, entitled under the Act of June 15, 1917, to the just compensation to be paid because of the requisitions (R. 8 to 15). The Liberty Trust Company (as the successor in interest of the Fidelity Trust Company) thereupon on February 4, 1927 (R. 16) filed its petition to intervene and claim on its own behalf, as a party in interest, compensation due from the United States because of the requisitions and was admitted to so intervene (Petition as amended R. 16 to 29).

The Court of Claims disallowed the claim of the Acme Operating Corporation on the ground that its alleged charters were fictitious but allowed the claim of the Liberty Trust Company to the extent of $129,299.76 for which judgment was entered (R. 60).

The United States petitioned this Court for a writ of certiorari based on an assignment of certain alleged errors of the Court of Claims (R. 5). This petition was allowed and the case is now before this Court under the writ.

ARGUMENT.

I.

THE BASIS IN FACT AND IN LAW OF THE CLAIM OF LIBERTY TRUST COMPANY.

(A) *The Mortgages Involved and the Nature and Extent of Mortgagee's Interest.*

As stated in the intervening petition (R. 16) Allan S. Farwell of Ashland, Massachusetts, took title in the two vessels in the fall of 1917 by purchase from the Eastern Steamship Company, the purchase being consummated with funds loaned in part by the Fidelity Trust Company of Boston, Massachusetts (R. 30 and 31, Findings 2 and 6). The title of the J. S. Whitney was taken by Farwell on October 30, 1917, and a mortgage concurrently given by him to Fidelity Trust Company and recorded at the office of the Collector of Customs at Boston securing the mortgage note of $150,000 given to the Trust Company for its advances; on the same date Benjamin L. Stafford and Robert E. Miller, co-partners, purchased the vessel from Farwell, subject to the mortgage given by him to Fidelity Trust Company; Miller and Stafford in turn executed a bill of sale to the Equitable Trust Company, subject to the mortgage given by Farwell to the Fidelity Trust Company, as security for the advances made by the Equitable Trust Company. On December 4, 1917, a similar course was followed as to the H. M. Whitney except that the loan of the Fidelity Trust Company, and mortgage given by Farwell securing it, was for $200,000 (R. pp. 16 and 17 III and IV; R. 30, Finding 2, and R. 31, Finding 6). Later, on January 3, 1918, the J. S. Whitney was conveyed, subject to the mortgages, to Acme Steamship Company and the H. M. Whitney on January 4, 1918, similarly conveyed to Whitney Steamship Company (R. 33 and 34, Findings 13 A and B) being

New York corporations formed by Stafford and Miller (R. 32, Finding 12).

The home port of each of the vessels, on the consummation of the conveyance to Farwell, was Boston, and the situs of the vessel was according to its home port.

Hays v. The Pacific Mail Steamship Company, 17 How. 596.

The mortgages so given by Farwell to Fidelity Trust Company, both residents of Massachusetts, executed (R. 62) in Massachusetts and forthwith recorded with the Collector of Customs in Boston, were Massachusetts mortgages, the effect of which was governed by the law of Massachusetts.

Until the passage of the Ship Mortgage Act in 1920 Congress had not seen fit to legislate in any manner as to vessel mortgages or rights under them except to prescribe as to the recording of them (R. S. Sec. 4192). Subject to the law as laid down by statute and by the courts of admiralty as to the attaching and precedence of liens of other kinds and as to the mortgagor being the "owner" under the statutory provisions relating to the enrollment, registration and operation of vessels of the United States, the status of title as between the mortgagor and mortgagee was left as determined by the applicable state law.

The mortgages given to Fidelity Trust Company were Massachusetts mortgages and the effect of the mortgages was as determined by the law of that state. Under the law of Massachusetts the mortgagee has such a title in the property as enables him to have recovery in his own behalf for any dealing with the property which affects adversely his interest,

Delano v. Smith, 206 Mass. 365,

where the court says, pp. 369 and 370,

> "Whether the mortgagee is in possession of the mortgaged premises or not, or whether his right to possession begins only with the breach of condition and there has been no breach, nevertheless he has such an interest in the property and its preservation as enables him to maintain an action in his own name for injury to it. Such right of action is founded not upon the right to present possession, but on title to the estate. He may maintain such an action, although he is a junior mortgagee and although the security remains ample for his protection. He has a right to his security unimpaired."

See also, Hutchings v. King, 1 Wall 53 [illegible], and other cases cited in *Delano v. Smith, supra.*

(B) *Lien Interests in the Vessels.*

In addition to its mortgage rights there had become vested in Fidelity Trust Company, and through it in Liberty Trust Company as its successor, the lien interests of Valk & Murdock Co. in the J. S. Whitney to the amount of $132,509.45 and interest, which that Company had on the date of requisition for work previously done and materials furnished by that Company in the reconditioning and enlargement of that vessel (R. 37 and 38; Finding 18) and to the major portion of lien interests of Theodore Crane's Sons Company in the H. M. Whitney, to the amount of $253,640.33 and interest, for work and material similarly done and furnished by that Company (R. 37 and 38, Findings 18 and 19).

These lien interests were on August 5, 1919, purchased by and assigned to Fidelity Trust Company in full by Valk & Murdock Company and by the Crane Company to the extent of $206,526.10 (R. 47, Finding 29) and in turn by it to Liberty Trust Company on April 7, 1921 (R. 47 and 48, Finding 29).

By these assignments the Fidelity Trust Company, and through it the Liberty Trust Company, succeeded to the lien rights of the lienors in the vessels.

The Ruth E. Merrill, 286 Fed. 355 (C. C. A. 2nd. Cir.).

(C) *The Status of the Vessels When the Steamships Were Requisitioned.*

The two vessels were requisitioned in April, 1918, at the request of General Pershing for the particularly severe service for vessels of this type, of towing barges across the Atlantic (R. 37, Finding 16). Both of the vessels had, before they were requisitioned, been undergoing extensive reconditioning and enlargement which, as to the H. M. Whitney, had been wholly completed (R. 31 and 32, Finding 9) at a cost of $369,739.90 by Theodore A. Crane's Sons Company (R. 31 and 32, Finding 9), and as to the J. S. Whitney substantially completed, at a cost of $243,664.48, by Valk & Murdock Company (R. 31, Finding 8). This work had put both vessels in complete repair and condition.

On the work done on the H. M. Whitney a balance of $253,640.63 remained unpaid and on the J. S. Whitney a balance of $132,509.45 (R. 31 and 32, Findings 8 and 9).

Before the H. M. Whitney was taken on requisition on April 29, 1918 (R. 38, Finding 19) a libel had been filed by the Crane Company in the District Court for the Eastern District of New York and she had been arrested and was in the hands of the United States marshal. She was by order of the court on April 29 turned over to the United States Shipping Board "to be utilized for military purposes" (R. 37, Finding 16), with the master of the vessel and each successive master to be appointed by the marshal as his special deputy marshal in custody of the vessel and with the vessel to be returned to

the marshal on release from requisition (R. 38, Finding 19).

Shortly after the J. S. Whitney was requisitioned on April 27, 1918, she was arrested by the United States marshal pursuant to a libel in rem filed against her in the District Court for the Eastern District of South Carolina by Valk & Murdock Company for the $132,509.45 balance of its claim against her for labor and material furnished incident to her reconditioning and enlargement. On May 27, 1918, she was by order of the court delivered over to the Shipping Board pursuant to the requisition, subject to an order entered May 18 that, in order to protect the rights of parties having prior liens on the vessel and who had come into court to have them adjudicated, the amount to be paid for the use of the vessel would be treated as and in lieu of the vessel itself, and that the libellants were entitled in priority to the owners to any sum or sums to be paid on account of the requisition of the vessel (R. 38, Finding 18).

As the learned counsel for the United States has appeared to attach considerable importance to the point whether the owner of the vessels or the mortgagee was in possession when the vessels were turned over to the Shipping Board under the requisitions, it is to be noted that they were in the possession of neither of them but were in the possession of the United States marshals in these proceedings.

(D) *The Status of the Mortgages Held by the Fidelity Trust Before the Vessels Were Taken Over Under the Requisitions and the Effect of the Requisitions on the Mortgages and Mortgagee's Rights and Security.*

At the time of the requisitions the mortgages on both of the vessels were very nearly matured, the maturity date on the J. S. Whitney mortgage being April 30, 1918

(R. 37, 60) and of the H. M. Whitney mortgage being June 4, 1918 (R. 37, 61). On the J. S. Whitney mortgage there was a large margin of security value in the vessel above the lien claim of $132,509.45 and the mortgage of $150,000, the fair market value of the vessel being $544,000 (R. 49, Finding 32). On the H. M. Whitney there was a fair margin of such security, the lien claims being $253,640.33, and the fair market value of the vessel $500,000 (R. 49, Finding 32), leaving a margin of $46,-359.67 above the mortgage of $200,000. Except for the intervention of the requisitions the Trust Company could on the maturity of each mortgage have purchased the lien claims and then taken possession and foreclosed under its mortgage, bidding the vessel up to a point necessary to give it full satisfaction of the mortgage indebtedness, or permitted the vessel to be sold under the lien proceedings, bidding it up to an amount sufficient to satisfy the liens and its mortgage out of the proceeds and by petition in the lien proceedings getting its mortgage paid out of the proceeds of the sale above the amount required to satisfy the maritime lien.

The Rupert City, 213 Fed. 263 at p. 266
The Conveyor, 147 Fed. 586 at p. 589
The J. E. Rumbell, 148 U. S. 1 at p. 15.

Its very power to do this would have enabled it, without the exercise of the power, to bring either the mortgagor or the junior mortgagee, the Equitable Trust Company, to the point of dealing with the lien claims in such a manner as to eliminate them as liens having priority to its mortgage, for the demand for vessels was such that charter hire rates for this class of vessel stood at 41 s. 4 d. per d. w. ton per month for vessels of this class (R. 44, Finding 25) figuring in dollars $9.82, amounting at that rate to $364,125 a year on the J. S. Whitney of 3090

d. w. t. capacity and $380,623 on the H. M. Whitney of 3230 d. w. t. capacity (R. 32, Finding 10).

The taking of the vessels by requisition took away from the courts their powers to deal in rem with the vessels by sale, for that power was solely to sell, and deliver on sale, the vessel; it similarly took from the mortgagee in essence for the time being its mortgage rights, for its power also was solely to take possession of and sell and deliver on sale the mortgaged property. Also, if the very doubtful assumption can be made that some right could have been worked through a court in equity by which, in lieu of the sale and delivery of the vessel, a sale in some form might have been permitted of such rights as the mortgagor had, there would have been no general or satisfactory market for the problematical chose in action which alone could have been sold. Also, any suit, to have established and carried out any such novel remedy, would inevitably have been contested and carried to the highest court in view of the values involved, and could not have reached final decision except at large expense and at the end of a long period. The only practical thing to do was to wait, as the admiralty courts did, for the requisitions to be terminated.

The requisition at once involved the Trust Company in a further difficulty. Affreightment commitments had, before the requisitions, been entered into as to both vessels by the Company owners. Only a portion of the cargoes had been taken on board the vessels, but freight money had been received in advance apparently as to all the commitments. It would appear that it was the obligation solely of the Government to take care of this situation on its requisition, with the benefit to all parties having interests in the vessels to such exemption from liability as the doctrine of *vis major* would give and indemnity

to them by the Government from any liabilities created by its seizure of the vessels.

On August 12, 1918, the Shipping Board succeeded, however, in getting the two owning companies to sign and Fidelity Trust Company, through ill advice or improvidently, to join in signing the agreement, a copy of which is annexed to the petition of Fidelity Trust Company (R. 24 to 38; also R. 39 and 40, Finding 21). The provisions of the agreement which are material to this case are that the Shipping Board might unload the cargo which had been put on board the vessels and forward to destination all of the cargoes on which there had been commitments; that, out of the sums which might become due to the owner companies as just compensation, all costs, with interest, for doing this should be deducted, and finally, that, if there was a deficiency after applying such just compensation, the United States should have a lien upon the vessels, and both of them, for the deficiency in priority to the mortgage liens of the Fidelity. The unreasonableness and improvidence of this last provision is apparent in view of the fact that, even aside from the protection of *vis major*, there would be no lien attaching to the vessels in diminution of the Fidelity mortgage lien except of those particular shippers for whom cargo had been put on board and with an offsetting right in the mortgages to the freight money; also it would appear that the large extra charge ($150 [illegible] 33) for [illegible]"

RIDER FOR INSERTION page 11 immediately after paragraph ending "Should have been borne by the Government":

No lien, in fact, was acquired by the shippers for non-performance of the contract of carriage, as the requisition of the vessels by the Government operated to dissolve the contract of carriage and absolved the vessels and their owners from liability under it.

The Texas Co. v. Hogarth Shipping Co., Ltd., 256 U. S. 619, 629, 631. Vacuum Oil Co 248 U.S. Accordingly it was adjudged that "the *owner* (italics ours) accepts this requisition charter in full satis-

d. w. t. capacity and $380,623 on the H. M. Whitney of 3230 d. w. t. capacity (R. 32, Finding 10).

The taking of the vessels by requisition took away from the courts their powers to deal in rem with the vessels by sale, for that power was solely to sell, and deliver on sale, the vessel; it similarly took from the mortgagee in essence for the time being its mortgage rights, for its power also was solely to take possession of and sell and deliver on sale the mortgaged property. Also, if the very doubtful assumption can be made that some right could have been worked through a court in equity by which, in lieu of the sale and delivery of the vessel, a sale in some form might have been permitted of such rights as the mortgagor had, there would have been no general or satisfactory market for the problematical chose in action which alone could have been sold. Also, any suit, to have established and carried out any such novel remedy, would inevitably have been contested and carried to the highest court in view of the values involved, and could not have reached final decision except at large expense and at the end of a long period. The only practical thing to do was to wait, as the admiralty courts did, for the requisitions to be terminated.

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On December 4, 1918, there was further executed, between the Acme Steamship Corporation as to the J. S. Whitney, and the Whitney Steamship Company as to the H. M. Whitney, *nunc pro tunc* as of April 27 and April 28, 1918, so-called requisition charter parties (R. 41, Finding 22) by which it was provided that "the *owner* (italics ours) accepts this requisition charter in full satis-

faction of any and all claims *he* has or may have against the United States arising out of the requisition and accepts the compensation herein provided for as the just compensation required by law". It is on the basis of these instruments and the 5.15 and 5.65 per d. w. t. rates specified in them that the account of the Fleet Corporation (R. 50 and 51) was worked out showing nothing owed by the United States and a balance due to it of $77,068.54. The Government also contends that these charters, having been entered into by the mortgagors in possession of the vessels, did away with the requisitions altogether and cut out all rights of those holding liens on the vessels to any claim for just compensation to them based on requisition.

The answer of the Liberty Trust Company to these contentions is as follows:

> (1) That the owning companies were not in possession of the vessels, but that they were in possession of the courts in which the libels had been filed, subject to the rights of the Shipping Board in them through its requisitions (R. 38, Finding 19).
>
> (2) That it was only by virtue of these requisitions that the United States could continue to hold them, under the orders of the courts by which they had been turned over to the Board, as against the rights of all lien holders of all kinds in the court proceedings.
>
> (3) That in the order of the District Court of Eastern New York it was expressly provided that the vessels should be returned to that court to be dealt with under the lien libel on any termination of the requisition and that, with the Shipping Board continuing to hold them under that order, its status could not be changed to that of a charterer by agreement with the owners against whom the lien holders were endeavoring to enforce their claims.
>
> (4) That by the order of the South Carolina District Court it was provided that the amount to be paid for the use of the vessel requisitioned would be treated as in lieu of the vessel and that the lienors were entitled to priority to the owners "to any sum or sums to be paid on account of the requisition of

the vessel" (R. 38, Finding 18). That by this is meant, not such sum, insignificant or otherwise, as the adverse parties (the owning companies) might choose to agree to, but the just compensation provided by the statute.

(5) That by its express terms, the requisition charter provided only that the *owner* accepts this requisition charter in satisfaction of any and all claims that *he* has arising out of the requisition and the compensation provided for as just compensation (R. 41). The agreement, both in its terms and for the reasons above stated, can have no effect except as a settlement operating solely between the United States and the owners as to their claims and interest.

(6) That the requisition charter does not have the effect of enabling the United States to substitute, in determining under the August 12, 1918, agreement whether there was a deficit which would give rise to a lien on the vessels in favor of the United States, the amount which the United States, under the December 4, 1918 agreement, agreed to pay the owning companies, in the place of the "just compensation" according to law referred to in the August 12, 1918 agreement and as defined in

Seaboard Air Line et al. v. U. S., 261 U. S. 299
United States v. New River Collieries Co., 276 Fed. 690
United States v. New River Collieries Co., 262 U. S. 341;

also that if the contention is made that the question whether such a lien came into existence is of any materiality in this case, the burden is on the United States to prove, in establishment of any claim of such a lien, that just compensation to the owner companies for the use of the vessels, determined in the manner prescribed in the above cited cases, amounts to less than the cost of forwarding, etc., the cargoes, and, if so, how much less. There is a finding in the case as to going charter rates (R. 44, Finding 25) which, as computed and tabulated

in "Appendix 'A' ", appear affirmatively to show that, on figures based on just compensation, instead of figures under the agreement of December 4, 1918, taken by the Shipping Board in its account (R. 50 and 51), there was no such deficiency. If the meaning of the words "just compensation" as used in the August 12, 1918 agreement is open to any doubt, the extreme severity and, it would seem, unfairness, of that agreement, so far as concerns the Fidelity Trust Company, would seem to call for any admissible construction which would tend to protect it against such unfairness.

It is to be noted that no one having any interest in the requisitioned vessels has ever actually been paid anything for the year and three months' use which the United States had of the vessels or for any loss or damage suffered by them by reason of the requisitions.

What the United States did was to unload the cargo which was on board the vessels at the time of requisition and cause to be transported 16,412,939 pounds of cargo, or 7327 tons plus 459 pounds, to their destinations, for which it charged $703,560.33 (R. 42, Finding 23), in addition to which it made charges for $159,800.10 for discharging, storage, etc., of cargo on board at the time of requisition. Some time after the termination of the requisitions it made up an account by which, by charging these amounts and some other items and figuring its use at the $5.65 and $5.15 rates specified in the December 4, 1918 agreement, a balance in favor of the Shipping Board was arrived at (R. 50 and 51, Finding 33). This large charge of removing and storing the cargo which had been placed on board was solely an incident of and due to the requisition and should have been borne by the Government.

Except as to a remnant of 1007 tons and 459 pounds, the J. S. Whitney and the H. M. Whitney could, with

their d. w. t. of 6320, have completed the transportation of these cargoes in one voyage each and with no expense of removal of cargo. It is apparent that in arranging for the transportation of these cargoes the Shipping Board did not use vessels at the $5.65 or $5.15 rate to which they got the owning companies to agree as to the J. S. Whitney and H. M. Whitney, or exercise that keenness in behalf of those companies, as to compensation charges, which it exercised in behalf of itself as to the J. S. Whitney and the H. M. Whitney. The result was that the owning companies were charged more for two voyages required for the transportation of the commitment cargoes (plus the transportation of 1007 tons and 459 pounds) than was credited for the use by the United States of the J. S. Whitney and the H. M. Whitney for the fifteen months' period during which the United States had them. The United States made up an account as between it and the two owning companies (R. 50 and 51, Finding 32) and, on the strength of that account showing nothing owed to the owning companies, paid nothing to anyone having interests in the vessels, and contends that the Liberty Trust Company, as the holder of mortgage and repair lien claims antedating the requisition, is entitled to nothing.

(E) *The Impairment of the Mortgage and Lien Security Resulting from the Requisition Takings.*

The findings of fact appearing in the record establish, as scheduled below,

(1) that at the time of the taking there was, in the case of the J. S. Whitney, for the security of the $150,000 mortgage, a vessel market value of $261,490.55 in excess of the mortgage and that, as the result of the requisition, the detention of her under it, and the impaired condition in which she was returned, the margin of security had

been reduced to $126,771.93 or by an amount of $134,-718.62;

(2) that, on the return of the H. M. Whitney in July, 1919, a diminution of $174,406.60 in the security value had not only entirely wiped out the margin of security at the time of the requisition but had reduced the security value to an amount $128,046.93 less than the mortgage indebtedness.

SCHEDULE

SS. J. S. WHITNEY

April 27, 1918

Value in sound condition (R. 49, F. 32)		$544,000.00
Valk & Murdock lien (R. 37, F. 18)	132,509.45	
Mortgage to Fidelity Trust Co.	150,000.00	282,509.45
Margin of security		261,490.55

July 10, 1919

Value *if* in sound condition (R. 49, F. 32)		482,000.00
Cost of reconditioning (R. 43, F. 24 and R. 66)	52,377.26	
Valk & Murdock lien	132,509.45	
Int. thereon 6% Apr. 27/18—July 10/19 1 yr. 73 days	9,562.81	194,449.52
		287,550.48
Int. on Mortgage from maturity Apr. 30/18 (R. 37 and 61) to July 10/19 1 yr. 71 days		10,778.55
		276,771.93
Principal of mortgage		150,000.00
Margin of security		126,771.93
Impairment of Security		134,718.62

SS. H. M. WHITNEY

April 29, 1918

Value, in sound condition (R. 49, F. 32)		$500,000.00
Theo. Crane Sons lien (R. 38, F. 19)	253,640.33	
Mortgage to Fidelity Trust Co.	200,000.00	453,640.33
Margin of security		46,359.67

July 8, 1919

Value *if* in sound condition (R. 4⅞, F. 32)		436,000.00
Cost of reconditioning (R. 43, F. 24 and R. 66)	76,922.50	
Theo. Crane Sons judgment lien (R. 47, F. 29)	260,149.87	
Interest thereon—6% Aug. 16/18 to July 8/19 (326 days)	13,841.16	350,913.53
		85,086.47
Interest on Mortgage from Maturity June 4/18 (R. 37 and 61) to July 8/19 1 yr. and 34 days		13,133.40
		71,953.07
Deficiency to cover principal of mortgage		128,046.93
Total impairment of Security		174,406.60

The learned attorneys for the United States seek to avoid the effect of this serious impairment of the security on the H. M. Whitney by grouping the two securities and the two mortgages together (Brief p. 34). This is clearly untenable; they were separate mortgages with separate security.

(F) *The Basis in Law for the Contention of Right To Compensation For The Impairment of the Security Value.*

The right of compensation given by the statute is not confined to compensation to any one party having a vested interest in the res, but extends to all parties having such interest in accordance with their respective interests.

A. W. Duckett & Co. v. United States, 266 U. S. 149

where the United States requisitioned and took, on January 31, 1918, for temporary war use, the Bush Terminal, including Pier 8 on which the claimant held a lease running to September 30, 1919. The claimant was, in the Court of Claims, denied any compensation for the taking. This court reversed the decision, stating at p. 151:

> "Here the taking purported to be a taking of the Bush Terminal Dock, etc.—not of the title of the Bush Terminal Company, but of the things to whomsoever they belonged. The notice was 'to whom it may concern.' The claimant was turned out like the others. We can see no ground for attributing to the United States the extraordinary intent to recognize and pay for other interests but to exclude the claimant. The order made no such distinction but promised fair compensation, seemingly to all, and the appointment of a board of appraisers contemplated payment to tenants. Any arrangement that the Government may have made later with the owner to pay to it what might be due to the tenants or some of them did not affect the claimant's rights."

See also

> *Seaboard Air Line et al. v. United States,* 261 U. S. 299

where, under a statute similar to that involved in this case, the court says at p. 304 that the compensation intended to be given is "the full and perfect equivalent of the property taken", and

> *United States v. New River Collieries Co.,* 262 U. S. 341
> *United States v. New River Collieries Co.,* 276 Fed. 690 (C. C. A. 3rd Circ.)

as to the measure and scope of the compensation to be allowed.

The contention of the intervenor, as to its mortgage interests in the vessels, is that it was entitled, when the vessels were returned from requisition, to be in as good a relative position as to its mortgage security and the margin of it above the mortgage indebtedness as it was in when the vessels were taken by requisition, and that

the just compensation to which it is entitled is such sum as, with the vessels as they were as to value and condition when they were returned, would have put the mortgagee in that position. This amount, as figured in behalf of the intervenor in the Schedule *supra,* is $309,125.22. A certain margin of security is essential to cover expenses of foreclosure. Also the money value and safety of a mortgage and what the holder can, with a satisfactory result, do as to holding, disposing of or foreclosing it depends essentially on the margin of the security above the mortgage indebtedness.

The margin of security which the mortgagee had in April, 1918, was vital to the value and safety of its mortgages in view of the drop in the demand and freight rates of vessels (R. 44, Finding 25) and shipping values by July, 1919, which finally culminated in the shipping cataclysm of 1920, largely by reason of the operation of Shipping Board vessels left over from the war, at rates regardless of loss to the Government.

Parker v. New England Oil Corporation, 8 Fed. (2) 392 at 404.

President's Special Message to Congress, Congressional Record bound Vol. 63, pages 19 to 21.

After the vessels were returned in July, 1919, they could be operated only at a net loss. (R. 44, Finding 24.)

Until Congress provided for a preferred status for ship mortgages in the Ship Mortgage Act of 1920, full market value could never even approximately be obtained on a foreclosure sale of a ship mortgage, because of the unknown amount of numerous classes of liens which might come in ahead of the mortgage, including, in this case, any lien which the Government might claim under the August 12, 1918 agreement, the amount of which claim it never declared until November 1, 1926 (R. 50, Finding 32).

The Court of Claims failed to give effect in full to the intervenor's contention, but did allow the amount of $129,299.76 found by it to have been necessary to re-condition the vessels into the fit condition which they were in at the time they were requisitioned.

The intervenor has presented the full grounds of its claim for compensation, including in the computation the expenditures made and found by the Court of Claims to have been necessary to put the vessels into fit condition after they were returned as was the case when they were taken on requisition. This has been done, not with the conception that the intervenor can have the judgment in its favor increased in this proceeding, but in view of the contention in behalf of the United States that there was error in the reasoning on which the Court of Claims based its judgment for $129,299.76 and in view of the well established law that, if a judgment is not in excess of what the party was entitled to on a proper application of the law to the facts, the judgment will not be reversed because of any errors in the reasoning by which the lower court reached its conclusion.

Langnes v. Green, 282 U. S. 531 at 536 and 539.

See also

Revised Statutes, Sec. 726, Act of Feb. 26, 1919, c. 48 (40 Stat. 1181)

providing that:

> "On the hearing of any appeal, certiorari, etc., the court shall give judgment after an examination of the entire record before the court without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties."

The intervenor is entitled, in any event, to recover for the impairment of its security on the H. M. Whitney mortgage.

The mortgagee's security on the H. M. Whitney had become so greatly impaired during the Government's possession under the requisition that when the requisition terminated on July 8, 1919, the vessel, if she had then been sold for her then full sound value as found by the Court below, less the cost of reconditioning and without any expenses incident to the sale, would have brought only $85,086.47 above the judgment maritime lien of Theo. Crane Sons, or $128,046.93 less than the principal of the Fidelity Trust Company's mortgage and interest from its maturity (Schedule, *supra*, p. 17).

Interest from the maturity of the mortgage is a proper charge.

> *Dodge v. Perkins*, 9 Pickering 368, 385; *Robinson v. Bland*, 2 Burr. 1086.

The intervenor is, we submit, clearly entitled, in any event, to recover this deficiency of $128,046.93. As the Court below points out, the Government took possession of the ships shortly before the mortgage notes became due and the mortgagee could not obtain possession of the ships until the Government had released its requisition (Op. R. 62). It would have been an idle gesture for the mortgagee, during the period of the Government's possession, to have taken proceedings (if any such were available) to establish its right of possession except as against the Government, as the Court below suggests (Op. R. 63). It did, in fact, take possession through A. L. Crowley on the termination of the requisition (Finding 24, R. 43-44), which was the earliest time it could have done so after the commencement of the requisition.

The requisition took from the mortgagee its right to realize on its mortgage during the time the Government was in possession under the requisition. The effect of the Government's action was to make it impossible for the mortgagee to realize by $128,046.93 the amount due it on the H. M. Whitney mortgage; although it could have realized the full amount of the mortgage indebtedness except for the requisition (Schedule, *supra,* p. 17).

We submit that the intervenor is entitled to have this loss made good to it by the Government under the provisions of the Act of June 15, 1917 (c. 29, 40 Stat. 182) as interpreted by this Court in the Duckett case, *supra,* at top of page 18.

II.

THE JUDGMENT OF THE COURT OF CLAIMS IS SUPPORTED BOTH BY FINDINGS OF DAMAGE DONE DURING THE REQUISITION AND OF SUCH INJURY TO THE INTERVENOR THEREBY AS ENTITLED IT TO COMPENSATION IN THE AMOUNT AWARDED.

A. *The record contains the findings necessary to establish liability.*

In order to compensate for (*i. e.* to be equivalent to) the damage done, the amount awarded had to be sufficient to put the vessels back in the "staunch, strong, seaworthy" condition and "good repair" which they were in when taken (R. 49). It is clear from the opinion (R. pp. 65 and 66) that this is the measure of damages which the Court applied. We do not understand that, except for their point as to the requisition charter party, the Government denies the correctness of this measure of damages. Its contention is that the actual findings do not provide a proper factual basis for applying the said rule of damages, because it is said that it is not expressly found that the expenditures were necessary to restore the vessels to the condition in which they were when taken (Ass't. of Error No. 4, R. 5, Br. 21).

While, as has been said by this Court in *Stone v. United States,* 164 U. S. 380, this Court cannot refer to the opinion for the purpose of eking out the findings, it is none the less appropriate to read the findings in the light of the opinion. The opinion can properly be a deciding element in determining what the Court of Claims meant by any form of words used in the findings.

The case of *United States v. Wells,* 283 U. S. 102, was a suit to recover an additional estate tax paid in respect of certain property which was the subject of certain transfers claimed by the Commissioner of Internal Rev-

enue to have been made in contemplation of death. The crucial fact, therefore, was whether the transfers had been made in contemplation of death. The Chief Justice, in delivering the opinion of this Court, said, at page 111:

> "The Court of Claims did not find, in terms, that the transfers in question were not made in contemplation of death, but it is evident that the Court considered that its findings of fact amounted to that in substance, in view of the conclusion of law, based upon these findings, that the executors were entitled to recover the additional tax. This is also manifest from the opinion."

Applying the principle of *United States v. Wells* to the question in the instant case of whether the Court of Claims considered that its findings of fact amounted in substance to a finding that $129,299.76 was necessary to restore the vessels to the condition in which they were when taken, we find that the Court of Claims expressly found the following:

(1) When taken, the vessels were in all respects staunch, strong, seaworthy and in good repair (Finding 32, R. p. 49).

(2) When returned, the vessels were both in need of repairs (Finding 28, R. p. 46).

(3) The mortgagee paid $136,464.76 for sundry services and materials in connection with the two vessels (Finding 24, R. p. 43).

(4) Nearly all of this amount was for direct repairs (Finding 24, R. p. 43).

(5) There were some payments for surveys and port insurance, which were necessary expenses (Finding 24, R. p. 44).

(6) Two specific items aggregating $7,165 were not shown to have been in the nature of repairs or reconditioning worn parts of the vessels (Finding 24, R. p. 44).

The Court then concluded (R. 51) that the intervenor was entitled to recover the sum of $129,299.76, which exactly equals the $136,464.76 expended, less the $7,165 not shown to have been for repairs.

We submit that these findings and the conclusion without regard to the opinion show that the Court of Claims intended to find, and did find, the necessary cost of restoration. When to this we add, as an aid to interpretation, the opinion, and particularly the language of the Court on page 66, where they say:

> "The various items which made up these two expenditures all appear to be necessary expenses in reconditioning the ships, except a total of $7,165 expended for life boats. Deducting this amount, there were expended by the Trust Company for reconditioning the ships $129,299.76, which we think the intervenor is entitled to recover, together with interest from October 1, 1919."

the conclusion is inescapable that the Court deemed that the issue before it was to find the fair cost reasonably necessary to restore the vessels, and that it was the sum so determined that it awarded.

The defendant in its brief makes the following three arguments on the point that the judgment is not supported by the findings:

The first is based on the assumption that the Government is not liable to pay compensation for wear and tear (Br. 22). They cite no authority for this novel proposition, and we believe that none is necessary to refute it.

The second argument is that the absence of direct evidence is fatal to a finding by the Court of Claims (Br. 22). As it does not appear what indirect evidence there may have been on which to base the findings, it is submitted that the argument is unsound.

The third argument is that because the necessity of the expenditures did not appear from the Defendant's request for findings number XXVI there was a failure of proof (Br. 23). As this is based wholly on matters outside the record in this Court it may, we suppose, be disregarded. *Rogers v. United States,* 270 U. S. 154.

It is submitted that the record amply establishes the fact and amount of the Government's liability for damage to the vessels.

Stress is laid in behalf of the United States on the survey as to reconditioning which was made by a representative of the United States and a representative of the owning companies, with the Fidelity Trust Company not being represented in the survey. Aside from the point that no such survey in which the Fidelity Trust Company was not represented can in any way bind the Trust Company, it may be fairly stated that if the representative of the owning companies was as improvident and unreliable as its representatives appear from the record to have been in general in the conduct of their business, conclusions concurred in by him would be of slight value. Also, the actual cost of conditioning a vessel is much more conclusive than any preliminary estimates.

It is well established that findings of fact of the Court of Claims have the same effect as jury findings.

United States v. Wells, 283 U. S. 102,

at page 120, where the Court says:

> "Findings of fact of the Court of Claims are to be treated like the verdict of a jury."

(B) *The intervenor had a sufficient interest in the requisitioned vessels to entitle it to compensation.*

While the Government is correct in its statement as to the absence of an express finding on the law applicable to the mortgages, it appears from the opinion of the Court of Claims (R. p. 61) and from the language of the petition for certiorari (R. p. 7) that the parties tried the case in the Court below on the theory that the mortgages were Massachusetts mortgages. (See also opinion, R. 62.) No question was raised in the petition for certiorari as to the fact that the mortgages were Massachusetts mortgages, and we submit that the point should not considered as raised here.

> *Alice State Bank v. Houston Pasture Co.*, 247 U. S. 240, 242.
> *Webster Co. v. Splitdorf Co.*, 264 U. S. 463, 464.
> *Steele, Executor, v. Drummond*, 275 U. S. 199, 203.
> *Commercial Credit Co. v. The United States*, 276 U. S. 226, 228.

The Government contends that state law is not binding in this proceeding in any event. While we do not believe this point to be well taken, it does not help the position of the Government. Clearly, in the absence of a Federal statute as to ship mortgages (and admittedly there was none until 1920), the common law would control. It is, of course, well established that at common law a mortgage—be it of a ship or other species of personal property—passed title, and that the lien states represent a departure from the common law mainly by statute, although in some cases by judicial legislation.

Considered as Massachusetts mortgages, there can be no doubt of the intervenor's legal title to the vessels, and, we submit, the rights given to mortgagees under the long established law of the Commonwealth are not merely rules of damages, but are a necessary and logical inci-

dent to the title vested in the mortgagee. One of the incidents of such title is that the mortgagee can recover for injury to the mortgaged property, whether or not the mortgagee is in possession and whether or not the sufficiency of his security is impaired.

Delano v. Smith, 206 Mass. 365, at page 369.
Morgan v. Gilbert, 2 Fed. 835.
Wilmarth v. Bancroft, 10 Allen 348.
Gooding v. Shea, 103 Mass. 360.
Byrom v. Chapin, 113 Mass. 308.
Searle v. Sawyer, 127 Mass. 491.
James v. Worcester, 141 Mass. 361.
Stewart v. Finkelstone, 206 Mass. 28.
Holmes v. Sprowl, 31 Me. 72.
Foster v. Perkins, 42 Me. 168.

The Government contends that the principle of the cases which give the mortgagee compensation for the taking or damage of mortgaged property, is not founded upon the mortgagee's interest in the property, but upon the *wrongful* nature of the defendant's act (Ass't. of Error No. 2, R. 5, Br. 30). This is apparently based on what we conceive to be the erroneous assumption that there are but two classes of takings—rightful takings and wrongful takings. In fact there are three distinct situations: (1) a taking by consent, (2) without consent or right, and (3) without consent but by right of sovereignty. The Government argues from cases holding that there is no cause of action for a deprivation which has been consented to that there is no right to compensation for a deprivation *in invitum*. The element of whether the injury can be justified as an exercise of paramount authority in no way affects the right of the injured party to compensation, which is in either case payable on account of the injury. That a mortgagee not in possession may recover for a taking by eminent domain is shown by the decision of this Court in *Chicago*

v. Tebbetts, 104 U. S. 120. The Government attempts to distinguish this case, on page 32 of its brief, on the ground that the mortgaged property was destroyed. There is nothing in the opinion of this Court to indicate that the result would not have been the same had the taking resulted in a partial destruction of the security as distinguished from a total destruction.

It appears clear from the case of *Chicago v. Tebbetts, supra,* that the right of the mortgagee to compensation, according to his interest, on the taking by eminent domain, whether by requisition or otherwise, is not dependent on the particular view taken in any state as to the exact nature of his right or title, or whether he was or was not in possession at the time of the taking. See also *Hutchins v. King,* 1 Wall. 53.

Putting an extreme case to test the principle, suppose that there is a value in the property only slightly above the mortgage, that the war is long continued and the vessel put to such severe use that the value, on return from the requisition, amounts only to a small percentage of the amount of the mortgage liens: Is it conceivable that the mortgagee would be held to be entitled to no compensation either because the property had not been completely destroyed, or because he was not in possession under his mortgage or had only a lien as against a title right? It is to be noted that holders of admiralty liens have no title interest but only a lien interest. Are they to be deprived of the value of such interests by a requisition on the grounds that they are not in possession, or have no title interest?

If the question whether the mortgages were Massachusetts mortgages duly recorded at the office of the Collector of Customs in Boston is before this Court on the certiorari petition and is deemed vital to the question of recovery, the case, in accordance with the practice stated in *Luckenbach S. S. Company v. United States,* 272 U. S.

533, at page 539, should be remanded to the Court of Claims for further findings on this point.

C. *The effect of the inadequacy of security.*

The attorneys for the Government in a footnote to page 34 repeat the error in their statement as to the security of the mortgages at the time of the release of the vessels from requisition by treating the mortgages and maritime liens as attaching equally to both the vessels, and by omitting interest on overdue mortgages and a judgment of the District Court, and also by treating the damaged vessels as if they had the value of ships in good repair. As we have already pointed out on page 17 of this brief, it is manifestly improper to group the two securities and the two mortgages together. As shown by the tabulation on pages 16 and 17 there was a deficiency at the time of the return of the H. M. Whitney of $128,000. As to the J. S. Whitney, the tabulation shows that the margin of security had been more than cut in half, even on the Government's theory of computing impairment of security.

The Government's theory assumes that a vessel out of repair could be sold for the full amount of the market price less the cost of repairs. It is an assumption contrary to known fact that a vessel in a condition requiring $52,000 of repairs and almost two months' time in which to make the repairs could have been sold for the price of a sound vessel less the actual cost of repairs. If charter hire for the period of repairs taken at the rate specified in the requisition charter party be added to the deduction for the cost of repairs, it would wipe out a substantial part of the margin. Add to these elements the fact which is common knowledge that at the time of the release of these vessels the market was rapidly falling, due to the sudden flooding of the market by the

return of requisitioned vessels and the availability of Shipping Board vessels, and it becomes even more apparent that the mortgagee, instead of having the security it had contracted for, had returned to it a vessel from which it could not have realized the amount of its mortgage.

It is further to be borne in mind that during this period, at which the Government says that the mortgagee could have sold the vessel and come out whole, the Government was claiming a lien of unascertained amount (Finding 33, R. 50) and that it is only by eliminating this asserted lien that the value of the security is not so reduced as to show an excess of mortgage over value substantially equal to the repair bill. The chances of the mortgagee's selling anyone a lawsuit with the Government were absolutely nil.

It is submitted that even if the mortgagee had not had the title given to it as grantee in a Massachusetts mortgage, but had had merely a lien on the vessels, the record amply shows impairment of its security sufficient to entitle it to recover for the physical injury done the vessels during the period of the requisition.

As the Government was liable for physical injury done to the J. S. Whitney during the period that it was held under requisition, the question of whether that element of compensation was payable to the mortgagor or the mortgagee is merely a question of the relative rights of those two parties. In determining the respective rights of the parties, it is immaterial, if the mortgagee's security is inadequate, what the cause of such inadequacy may have been. It is perfectly immaterial whether the Government was responsible for the inadequacy or whether it arose from some other cause. Therefore, whether or not the Government was under any obligation to pay compensation to anyone for reduced salability due to the

depreciation in market values, and due to the impossibility of sale, owing to the Government's claim of lien in an indeterminate amount, those points must be taken into consideration in determining whether, as between the mortgagee and the mortgagor, the mortgagee had, without collecting the compensation due for the damage to the vessels, enough other security for his protection. It is submitted that on the record in this case it appears that the mortgagee did not have that protection.

D. *The Mortgagee, as against all Parties but the Maritime Lienors, is to be considered as Mortgagee in Possession.*

The rule as to whether the cause of action is in the mortgagee or the mortgagor is based on the question of which of the two parties is in possession. There is no doubt that a mortgagee in possession can recover irrespective of impairment of security. At the time of the requisition of the J. S. Whitney, neither the steamship corporation nor the trust company was in possession, by reason of the proceedings in the Admiralty Court on libel by Valk & Murdock. (R. 38) Three days later, the mortgage on the J. S. Whitney matured (R. 37, 60). Thus at the time the injury was done to the vessels, both the mortgagor and the mortgagee were out of possession, and both were kept out of possession by the requisition until July, 1919 (R. 46). But for the requisition, the mortgagee could have enforced its rights by paying off the maritime lien and taking possession from the marshal. The rights of the mortgagee were at all times superior to those of the mortgagor. It is submitted that the Government, whose claim is in the right of the mortgagor, cannot properly raise objections to the mortgagee's claim on the ground that it was not in possession at the time the injury was done when the real

reason that the mortgagee was not in possession was the act of the Government itself in taking and holding the ship.

Nor does there seem any sufficient reason for applying the limitation to a case where before payment of compensation for the damage, the mortgagee has entered into possession of the vessel and properly filed its claim. Since the compensation is awarded for the purpose of making good the damage, it would seem that where the claimant's interest in the property, together with the right to possession of it, arose prior to the injury, and it is at the time of making claim in possession of the property and has actually made at its own expense the repairs for which compensation is to be awarded, no good reason exists for holding the mortgagor to be entitled thereafter to receive the compensation. In the instant case, the Government asserts, by claiming a set-off, a right through the mortgagor, and therefore stands in no better position than the mortgagor.

The instant case is closely analogous to that cited by the Court of Claims, *George Adams & Frederick Co. v. South Omaha National Bank*, 123 Fed. 641. In that case, the bank held a mortgage on 482 steers. The defendant removed 157 of these steers from Nebraska, and sold them in Chicago for the purpose of being slaughtered. The suit was for the recovery of the proceeds of sale of this portion of the mortgagee's security. The Court pointed out that the injury was not merely a temporary interference with the possession of the mortgagor for which he alone could sue, but consisted of an act whereby the mortgagee's security was destroyed. The Court said:

> "We can conceive of no sufficient reason why, under such circumstances, the wrongdoer should not be held liable to the mortgagee."

Nor does there seem any greater reason why in the instant case, the Government having failed to keep the vessels in repair and thereby destroyed over $129,000 of the intervenor's security, the showing of these facts and the nature of the intervenor's interest did not make out a case for compensation under the Act of June 15, 1917.

E. *Compensation due to the Mortgagee is not a subject of set-off under the Agreement of August 12, 1918.*

The Government places reliance on paragraph 2 of the agreement of August 12, 1918 (Br. 38), which contained provisions for setting off the compensation which might thereafter become due to the owners for the requisition against expenses incurred by the Government in connection with forwarding the cargoes, and on paragraph 4 of this agreement, which contained provisions for a lien on the vessels to secure any excess of forwarding charges remaining after a set-off under paragraph 2. We have argued elsewhere in this brief that the compensation to be set off against the forwarding charges was the statutory compensation and not the payment stipulated in the requisition charter parties and that as that shows a balance against the Government, compensation for the damage to the vessels was payable in cash and to us.

Even if the Court should hold that the charter party rates could be used as a measure of the Government's liability for the purpose of set-off under the agreement, paragraph 2 does not give the unlimited right of set-off claimed by the Government. We wish to point out an inaccuracy in the Government's statement of the provisions of this agreement (Br. 13). This is not by way of captious criticism, but because we think that the very point in which the agreement itself differs from the state-

ment in the Government's brief is highly indicative of the difference between the intent of the parties and the construction contended for by the Government. On pages 13 and 40 of their brief, at the end of Section IV, it is stated that the mortgagee agreed that *all payments on account of just compensation should be made to the mortgagor.* The agreement did not say *all* compensation. It said "all compensation which shall hereafter become due to the parties of the second part," *i. e.*, the steamship corporations. Furthermore, it was not contemplated that the mortgagors should ever touch a penny of compensation.

Compensation in eminent domain is universally thought of in terms of the thing taken, and not in terms of interests of persons therein. In the present statute it is not provided that compensation shall be made to persons, but for the requisition. When, therefore, in drawing the agreement of August 12, 1918, the parties departed from the words of the statute and added the words "due to the parties of the second part" they cannot be said to have meant thereby *all* compensation, but only such part of it as was due the steamship corporations, as distinguished from the part due the mortgagee.

The Government had taken the vessels in which the cargoes would otherwise have been forwarded and necessitated the use of other vessels. The charter hire of the requisitioned vessels was deemed to offset the charter hire of the vessels substituted. That which was considered as due the steamship corporations was, we submit, only the amount which was compensation for deprivation of use of the vessels. To that part of the compensation which might become due for damage sustained during the period of the requisition, the mortgagee was entitled. Its claim thereto was not waived, and was not within the Government's right of set-off.

III.

THE COURT OF CLAIMS HAD JURISDICTION OF THE CASE.

A. The Intervenor's Claim is for Just Compensation Under the Act of June 15, 1917.

The Court of Claims has jurisdiction to hear and to determine claims for compensation under the Act of June 15, 1917 (c. 29, 40 Stat., 182), because the Act expressly provided for suits "in the manner provided for in Section 145 of the Judicial Code." The only question, therefore, on the jurisdictional point raised by the Government is whether the intervenor's claim was for compensation under that Act. We believe that the allegations of the intervenor's petition (R. 16-24) demonstrate this fact. The petition set up that the intervenor was the holder of mortgages on the requisitioned vessels, that by the requisition the intervenor had been prevented from foreclosing its mortgages, and that by reason of the requisition the total value of the security had been destroyed (par. XVIII-A, R. 22). It then set out (paragraph XVIII-C, R. p. 23) that its claim was made under the Act of June 15, 1917, and claimed as compensation the full amount of the mortgage debts and such other relief to which it might be entitled.

It is submitted that the situation in the present case is analogous to that in the case of *A. W. Duckett & Company, Inc. v. The United States*, 266 U. S. 149. In that case, the President under the Act of August 29, 1916, had taken possession of a portion of the Bush terminal docks and warehouse property in Brooklyn. The claimant was a lessee of a portion of the premises taken. This Court, speaking by Mr. Justice Holmes, at page 152, said:

> "Whatever the effect of the taking there was a contract implied in fact by the President's order, and there is no doubt concerning the jurisdiction of the Court of Claims."

It is submitted that the intervenor's petition falls squarely within the jurisdiction expressly conferred on the Court of Claims.

B. The Claim Being for Compensation Payable Under An Act of Congress Conferring Jurisdiction on the Court of Claims is Not a Tort Claim.

The particular ground which the Government's specifications of error assigned as supporting the contention that the Court of Claims lacked jurisdiction was that the intervenor's claim is one sounding in tort (Ass't. of Error No. 1 R. 5). As the claim was founded on an Act of Congress, the limitation as to claims sounding in tort was not applicable.

Dooley v. United States, 182 U. S. 222.

Therefore, we take it that the Government must mean that the intervenor claimed compensation for something for which the Government had not by the terms of the Act of June 15, 1917, agreed to pay. The nature of the injuries caused by a conversion and by a taking by eminent domain are similar, the main difference between the two cases being that the first is an appropriation without right, and the second an appropriation by the right of constitutional authority, with an agreement for compensation for the injury. The fact that the injury complained of would have been a tort if committed without such authority and without provision for compensation does not make the claim any the less a claim for compensation if the injury is one for which Congress has authorized payment.

It is submitted that injury to the physical condition of vessels while appropriated to the Government war service must have been within the scope of the compensation contemplated by Congress. It could hardly be contended, if the Government had requisitioned a vessel and the next day had wrecked it, so that it was a total loss, that one day's charter hire would be the just compensation required to be made under the Act. Just compensation means full and fair compensation which will put the injured party in the position in which he would have been but for the injury.

> *Seaboard Air Line Ry. v. United States,* 261 U. S. 299.

Surely, therefore, a claim for the equivalent of the security lost by the damage which was caused during the period of the requisition cannot but be a claim for compensation for which the intervenor was expressly entitled to sue in the Court of Claims in the manner provided in Section 145 of the Judicial Code.

C. The Government's Contention With Regard to Matters Not Raised in the Petition for Certiorari.

The Government in its brief has attempted to support its jurisdictional point by arguing three alleged errors not mentioned in the petition for the writ of certiorari. They are not, therefore, under the rules of this Court within the scope of the review granted by the Court, and we submit that they should not be considered.

> *Alice State Bank v. Houston Pasture Co.,* 247 U. S. 240, 242.
> *Webster Electric Co. v. Splitdorf Electrical Co.,* 264 U. S. 463, 464.
> *Steele, Executor, v. Drummond,* 275 U. S. 199, 203.
> *Commercial Credit Co. v. United States,* 276 U. S. 226, 228.

If the Court should deem that these matters merit consideration, we submit that the Government's contentions are not well founded.

The first of these unassigned errors is that the intervenor's claim is not for compensation under the statute, because not arising *ipso facto* upon the Government's assumption of possession. This contention, we believe, is disposed of by what has been pointed out above; namely, that the Government's promised compensation includes damage to the property taken, whether the damage occurs *ipso facto* upon the taking or subsequently during the period of the taking.

The fact that the owners and the Government made requisition charter parties to which the intervenor was not a party could not affect the rights of the intervenor. The making of those charter parties did not operate to release the vessels from the Government requisition. Just as surely as the original requisition took from the owners the right to be in possession of the vessels, it took from the mortgagee the right to get into possession of the vessels. The defaults which gave the Intervenor the right to oust the owners occurred very shortly after the requisition (R. 37, 60), but these defaults could not be availed of until the ships were finally released in July, 1919, the mortgagee's rights of foreclosure were no more enforcible against the vessels on December 5, 1918, after the requisition charter parties had been executed, than they were during the preceding period of the requisition.

The suspension of the right of foreclosure occasioned by the original requisition was not ended by the change in the relation between the owners and the Government. The fact that the owners entered into a requisition charter party, however it may have affected the basis for compensation between the parties thereto, did not prevent compensation from accruing to other parties in re-

spect of injury to their interests arising out of the Government's action. While the owners might have given the Government the free use of the vessels so far as the owners were concerned, the fact remained that their predecessor had transferred the title to the vessels to the intervenor's predecessor as security for its debt, and for that reason the owners could not give to the Government the right to destroy the vessels or impair the security without compensation to the intervenor.

The second of the unassigned errors which the Government argues is based on the contention that the claim of the intervenor first accrued on the release of the vessels from the requisition, rather than on the disallowance of the claim by the Shipping Board, and that therefore the claim is barred by the Statute of Limitations (Section 156 of the Judicial Code). It is submitted that the language of the Act of June 15, 1917, amply demonstrates the unsoundness of this contention. The Act says:

> "If the amount so determined by the President is unsatisfactory to the person entitled to receive the same, such person * * * shall be entitled to sue the United States * * * ."

Obviously, the person entitled cannot tell whether he is going to be satisfied until the President has first, through the Shipping Board, made the determination, and the claim does not accrue until there has been an unsatisfactory determination.

It is well established that when Congress gives a governmental department jurisdiction to pass upon claims the Statute of Limitations does not begin to run until final action is taken on the claim by that department.

> *United States v. Lippett*, 100 U. S. 663 at 668.
> *United States v. New York*, 160 U. S. 598 at 617.
> *Smith v. United States*, 67 Court of Claims, 182.

The third of the unassigned errors which the Government argues is that the original proceeding in which the mortgagee intervened is not within the jurisdiction of the Court of Claims, as the matter was, under the Suits in Admiralty Act of March 9, 1920 (c. 95, 41 Stat. 525) within the exclusive jurisdiction of the District Courts, because the original plaintiff was a party to the requisition charter party and claimed compensation thereunder. Without considering whether there would have been anything in this contention if the facts were as stated by the Government on page 19 of their brief, it is a sufficient answer that they have not stated the facts correctly. In the first place, the original plaintiff was the Acme Operating Corporation. The party to the requisition charter party covering the J. S. Whitney was the Acme Steamship Corporation, and the party to that covering the H. M. Whitney was the Whitney Steamship Corporation (Rec. p. 41). Secondly, while a claim by either of the last two named corporations *for compensation due under the terms of the charter parties* might not have been within the Court's jurisdiction, such was not the nature of the claim filed. The actual claim was not by the steamship corporations, but by the operating corporation, on the ground that it held charters of the vessels from the steamship corporations, and that the requisition had deprived it of possession of the vessels, wherefore it claimed compensation under the Act. This was a claim which the Court was expressly given jurisdiction to hear and determine. It did hear and determine it, and on the merits found that the plaintiff was not entitled to compensation.

Nor is the statement of the Government that "the mortgagee sought only to share in any recovery which might be allowed the Acme Operating Company" (*sic*) (Pet'rs. Br. p. 20) in accordance with the facts. As

pointed out above, the intervening petition set forth in the record on pages 16 to 24 asserts an independent claim based on title as mortgagee. That the Court did not agree with the intervenor's contention as to the amount of damage done it does not change the nature of its claim. It was filed and allowed as a claim for compensation for the injury to property the title to which was vested in the intervenor.

D. The Case of Matson Navigation Co. v. United States is Not Applicable.

The case of *Matson Navigation Co. v. United States*, 284 U. S. 352, relied on by the Government, is not in point.

The Government's argument that this decision applies to the instant case is based on the assertion that the claim of Acme Operating Corporation, petitioner in the Court of Claims, "arose upon a charter party", and that therefore its cause of action was under Section 2 of the suits in Admiralty Act (41 Stat. 525), and that the intervenor's claim fails because the Court had no jurisdiction over the petitioner's claim. (Govt. Br. 10-11, 15-16, 19-20.)

In the *Matson* case suit was brought in the Court of Claims for the recovery of increased wages and bonuses paid by the petitioner, who was the owner of several steamers which it was operating for the United States under requisition charters. The cause of action arose solely under the tenth clause of these charters, (284 U. S. 354; 72 Ct. Cl. at 211) and was therefore exclusively a claim for breach of maritime contracts between the United States and the petitioner.

In the instant case the claim of the petitioner Acme Operating Corporation was not, as the Government asserts, based on a maritime contract; it was for just com-

pensation for the alleged taking of the petitioner's property resulting from the requisition of the steamers (R. 13-15; opinion R. 51, 54, 60). The defenses interposed by the Government to the petitioner's claim show that the Government conceded that the petitioner's claim came under the Act of June 15, 1917, and was within the jurisdiction of the Court of Claims (R. 54-55). The Government's present position is entirely inconsistent not only with the facts, but also with its position in the Court below.

The claim of the petitioner, Acme Operating Corporation, was dismissed because it was found to be the alter ego of the Steamship Corporations, and therefore precluded by the contracts between the Steamship Corporations and the Government from recovering for its alleged injury to its property rights as the result of the requisition (R. 59).

Although the above considerations are, we submit, sufficient to dispose of the Government's contention that the petitioner's cause of action was one in admiralty, we would also point out that the Court below found that both steamers were requisitioned for military purposes, (Finding 16, R. 37) and were used in the service of the army (Finding 21, R. 39). Therefore, even if the suit had been on the requisition charters, the Suits in Admiralty Act would not have applied. Section 2 of that Act provides that jurisdiction in the District Court is conferred only when the vessel involved was employed by the United States as a merchant vessel (41 Stat. 525).

IV.

THE PLEADINGS ARE SUFFICIENT.

It is contended by the Government that the intervening petition did not contain sufficient allegations to justify the awarding of compensation for the physical injuries

done to the vessels during the period of the requisition (Ass't of Error No. 5, R. 5, Br., p. 25, *et seq.*). As pointed out above, the petition set up that the intervenor had made loans on the two requisitioned vessels secured by mortgages recorded in the office of the Collector of Customs at Boston; that thereafter, on or about April 27 and April 29, the Shipping Board requisitioned said vessels and held them until released from requisition in July, 1919; that the vessels when released from requisition in July, 1919, had no market value and that by reason of the requisition by the United States its security as mortgagee was rendered worthless. The petition further alleged that the claim as assignee of the mortgages was made in accordance with the provisions of the Act of June 15, 1917. Wherefore, the intervenor prayed that the United States be ordered to pay the amount of the mortgages, plus interest, and for such other and further relief to which it might appear the petitioner was entitled. While the claim of the intervenor was based on the contention that the vessels had, during the period of requisition, become so far worthless that its security was wholly destroyed, the allegations formed an appropriate basis for proof of damage to the vessels and the intervenor's security by physical injury to the vessels while in the Government service.

As was said by this Court in the case of *Clark v. United States*, 95 U. S. 539, at 543,

> "If objected that the petition contains no count upon an implied contract for quantum meruit, it may be answered, that the forms of pleading in the Court of Claims are not of so strict a character as to preclude the claimant from recovering what is justly due to him upon the facts stated in his petition although due in a different aspect from that in which his demand is conceived."

Furthermore, it is fully apparent from the record in this Court that the case was tried below by both sides on this question of damage to the vessels, and in this connection we beg leave to call the attention of the Court to what the court below said on this matter (Rec., p. 65):

> "* * * it should be observed in this connection that this matter is specifically argued both by the Intervenor and counsel for defendant without any objection being made on account of the indefinite nature of the pleadings or motion for a more specific statement."

It is submitted that this contention falls within the rule laid down in *Wisconsin Central Railroad v. United States*, 164 U. S. 190, at 212, and repeatedly followed, where the Court said:

> "The record does not disclose that this objection was raised below, while the findings of fact show that the entire matter was before the Court for, and received, adjudication. Moreover, it has been repeatedly held that the forms of pleading in the Court of Claims are not of so strict a character as to require omissions of this kind to be held fatal to the rendition of such judgment as the facts demanded."

See also *Huse v. United States*, 222 U. S. 496.

V.

THE INTERVENOR'S POSITION AS SUCCESSOR TO THE RIGHTS OF THE MARITIME LIENORS.

The Government argues that the intervenor was entitled to nothing as successor to the maritime lienors for four reasons:

(1) Because the Court below did not grant judgment on that basis. The statute cited at the end of part I,

supra (40 Stat. 1181), and the decisions of this Court show that a judgment will not be reversed if on the whole record the claimant is on any theory entitled to the relief awarded. See also *Clark v. U. S.*, 95 U. S. 539, *supra.*

(2) Because the claim was one over which the court had no jurisdiction. This objection is no better founded as against the lien claims than against the mortgage claim and its unsoundness has been shown in part III, *supra.*

(3) Because the maritime lienors, by reason of the decrees in the admiralty cases were not injured by the requisition. As the Government paid no attention to the decrees, and did not comply with them, this contention comes with ill grace. See part I, Sections (D), (3) and (4), *supra.*

(4) Because the Government requisitioned nothing from the maritime lienors the liens were not impaired. The first half of this proposition is not so on the facts and the second half is immaterial.

The vessels having been arrested on the libel proceedings at the time of requisition, the possession of the admiralty courts was in equity that of the lienors on whose behalf the possession had been taken. The Government took the possession of the vessels away from the Courts in truth and substance. The fiction of calling the officer placed by the Shipping Board in command of one of the vessels a deputy marshal did not change the essential nature of the situation.

The Government therefore took the vessels from a lienor in possession. That status gave the lienors the first compensation payable for the requisition and was so recognized by the Admiralty Court. The steamship corporations had no rights which they could by private contract give the Government. The whole situation had been taken out of their hands by the courts. The counsel

for the Government seek to becloud this issue by saying that the Government had not totally destroyed the vessels, but had left enough to cover the liens. That is totally immaterial. We repeat—the first compensation payable belonged to the lienors—impairment of lien has no bearing on the question of the rights of a lienor in possession.

Nor is the agreement of August 12, 1918, of any importance in this connection. The claim as successor to the lienors is not based on any claim held or money invested in the situation at the time of entering into the agreement. It relates to claims which were in the hands of wholly independent third parties at that time. These claims were not mentioned in the agreement. On no possible construction can the statement that the lien for forwarding expenses shall be superior to the mortgage liens of the Fidelity Trust Company be held to mean superior to the maritime liens of Valk and Murdock or Theodore Crane's Sons. The intervenor's claim as successor to the construction companies is in respect of new and different money paid by it for the claims and the putting in of such new money gives it all and the same rights to claim compensation that the construction companies had. The Government can no more claim a set-off against the lien claims in the intervenor's hands than it could have claimed a set-off against Liberty bonds if the intervenor had used its money to buy that sort of Government obligations instead. At the time the vessels were released from requisition, Theodore Crane's Sons Company had a judgment lien of $260,149 on the H. M. Whitney and Valk & Murdock Company had a lien of $132,519 on the J. S. Whitney, plus in each case additional sums for in-

terest (R. 47), making a total more than three times the amount of the judgment in this case.

VI.

CONCLUSION.

The decision of the Court of Claims should be affirmed.

Respectfully submitted,

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APPENDIX A.

CHARTER HIRE RATES IN WORLD OPEN MARKETS.

1918	Current Charter Hire Rate per dwt. S. d.	Sterling Exchange Rate	Dollar Charter Hire Rate per dwt.	Ships J. S. Whitney 3090 T.	Ships H. M. Whitney 3230 T.
April (2 days)	41/4	4.76	9.82	2,022.92	2,114.57
May	41/4	4.76	9.82	30,343.80	31,718.60
June	38/9	4.74	9.21	28,458.90	29,748.30
July	36/2	4.72	8.55	26,419.50	27,616.50
August	33/6	4.70	7.88	24,349.20	25,452.40
September	39/3	4.68	9.18	28,366.20	29,651.40
October	45/	4.66	10.48	32,383.20	33,850.40
November	45/	4.64	10.42	32,197.80	33,656.60
December	37/2	4.62	8.61	26,604.90	27,810.30
1919					
January	29/4	4.60	6.76	20,888.40	21,834.80
February	21/6	4.58	4.93	15,233.70	15,923.90
March	22/5	4.56	5.11	15,789.90	16,505.30
April	23/4	4.54	5.29	16,346.10	17,086.70
May	24/3	4.52	5.47	16,902.30	17,668.10
June	25/2	4.50	5.68	17,551.20	18,346.40
July (1/3 mo.)	26/	4.50	5.87	6,046.10	6,320.03
			TOTAL	339,904.12	355,304.30
					355,304.30
					339,904.12
					695,208.42